to a Limitation Enactment, *i.e.* whether it should be the "liberal construction (*Perry* v. *Jackson*,[12] *Sturgis* v. *Darell*)[13] or "strict literal construction" (*Lloyds* v. *Butler*,[14] *Edmunds* v. *Waugh*[15] — "an Act taking away existing rights which must be construed with reasonable strictness.") But it appears that there is today no special method of construing Limitation Enactments — see *China* v. *Harrow, U.D.C.*[16] — Goddard L.C.J.:

"I can see no good reason for unduly limiting words which can apply to a particular case as the courts have always been against stale claims."

It would seem to me that the provisions of section 26(2) and section 17(1) of our Limitation Ordinance are closer in their terms to sections 23(4) and 24(1) and (3) of the U.K. Limitation Act, 1939. *Halsbury's* Laws of England, 3rd Edition, Volume 24, at page 208, paragraph 376 would also seem to distinguish between "acknowledgement" and "part payment". Therefore against the argument of the appellant on this point I would simply say that the intention of the legislature in our Limitation Ordinance is clearly expressed in the two subsections of section 27 of the Ordinance whereby subsection (1) provides that every acknowledgement shall be in writing and signed by the person making the acknowledgement and that subsection (2) provides that any such acknowledgement or payment may be made by the agent of the person by whom it is required to be made under section 26. It is the acknowledgment that must be in writing although both acknowledgement and payment may be made by the agent of the person. The distinction which must have been intended by the legislature with the words "acknowledgement" and "payment" used side by side is too marked to be overlooked or confused.

It is true that the grounds of judgment of the learned Magistrate omitted any reference to the Limitation Ordinance but to me this is not surprising having regard to the fact that having heard both the evidence of the plaintiff and the defendant he made findings of fact that (a) a loan was given with a promise to repay, and (b) payments towards the loan were made on three separate occasions, the last of which was in 1971. With those findings he might have considered it no longer necessary for him to decide on the question whether the claim was time barred. The omission by the learned Magistrate in this regard would not have affected the decision of this case.

One last word on a point raised early in the argument of the counsel for the respondent. This arises from the order I made at the previous hearing of the appeal where counsel for the appellant applied for postponement with a view to obtaining an affidavit from some person or persons from India to negate the existence of the loan in question. The application for adjournment was granted but until the date of the second hearing of the appeal no affidavit was filed by the appellant. It is urged on behalf of the respondent that the failure by the appellant to file the affidavit, which was the only ground for the application for adjournment, should entitle the court to presume against the appellant in the terms of section 114(g) of the Evidence Act, 1950. The explanation given on behalf of the appellant for this failure was that the defendant's wife in India is illiterate and therefore the statutory declaration or the affidavit could not be obtained. In my view this excuse is unreasonable as the fact that a person is illiterate does not make it impossible for that person to swear a statutory declaration or affidavit as the case may be. Therefore, with respect, I have to agree that under the circumstances it would be proper to infer that this new evidence (which was the sole reason for the adjournment) if produced would be unfavourable to the appellant.

For all the above reasons I have to dismiss the appeal with costs.

Appeal dismissed.

Solicitors: *Atma Singh Gill & Gill; Datuk Balwant Singh.*

PUBLIC PROSECUTOR v. HETTIARACHIGAE L.S. PERERA

[R.Cr.J. (Harun J.) May 7, 1976]
[Kuala Lumpur — Criminal Revision No. 4 of 1976]

Criminal Law and Procedure — Revision — Case postponed several times — Prosecution applied for adjournment on grounds that investigation had not been completed — Whether magistrate justified in acquitting and discharging defendant at that stage — Criminal Procedure Code (F.M.S. Cap. 6), ss. 173(f), (g), (m)(1), (n), 254 — Criminal Procedure Code (S.S. Cap. 21), ss. 182(g), 187 — Federal Constitution, art. 145.

The defendant was alleged to have neglected to exercise due control over his motor-car on August 14, 1973 at about 11.00 p.m. at Bulatan Data, Kuala Lumpur. The return date of the summons was October 24, 1974. When the case came up for hearing on November 11, 1974, the prosecution said that its witnesses were not available and hearing was postponed to November 28, 1974. On the adjourned date the prosecution said an important witness was absent and the magistrate discharged the defendant not amounting to an acquittal. Thereafter the prosecution applied for a fresh summons. The hearing date was adjourned again as the Magistrate was on leave. When the defendant appeared on December 23, 1975, the prosecution sought for an adjournment on the grounds that investigation had not been completed. Counsel for the defendant objected on the grounds that there had been several postponements in the past and the charge should not be left hanging on the defendant's head for so long. The magistrate thereupon acquitted and discharged the defendant.

The case had been called for on revision and the question before the court was whether the magistrate was right in making the order of acquittal at that stage.

Held, setting aside the magistrate's order of discharge and acquittal: (1) the prosecution's case had not been heard and the only power the magistrate had was to order a discharge under section 173(g) C.P.C., such discharge not amounting to an acquittal. In any event, a magistrate may only exercise his powers under section 173(g) C.P.C. if he considers the charge to be groundless. The magistrate therefore had no power to order an acquittal;

(2) according to article 145 of the Federal Constitution only the Attorney-General has the power to institute, conduct or discontinue any proceedings for an offence. Until he makes up his mind the courts have to wait. Magistrates therefore have no business to usurp the functions of the Attorney-General. If the police are slow complaints should be made to the Attorney-General who in the final analysis is answerable to Parliament.

Cases referred to:-

(1) *Public Prosecutor* v. *Suppiah Pather* (Penang Criminal Revision No. 14 of 1951), Noted Editorially at [1953] M.L.J. 126.

(2) *Kuppusamy* v. *Public Prosecutor* [1948] M.L.J. 25.

(3) *Ariffin bin Cassim Jayne* v. *Public Prosecutor* [1953] M.L.J. 126.

(4) *Tan Ah Chan* v. *R* [1955] M.L.J. 218.

CRIMINAL REVISION.

Abdul Kadir bin Musa (Deputy Public Prosecutor) for the Public Prosecutor.

K.L. Rekhraj for the defendant.

Harun J.: This case has been called for a revision.

The defendant was alleged to have neglected to exercise due control over his motor-car on August 14, 1973 at about 11.00 p.m. at Bulatan Duta, Kuala Lumpur. There is no record when the Summons (No: TN 6373/74) against the defendant for the alleged offence was applied for or issued but the record does show that the first return date of the Summons was more than a year later, that is on October 24, 1974. On that date the defendant appeared in court and hearing was fixed for November 11, 1974. When the case came up for hearing the prosecution said its witnesses were not available and hearing was postponed to November 28, 1974. On the adjourned date the prosecution said an important witness was absent but it appeared that was because he had not been subpoenaed, whereupon the magistrate discharged the defendant not amounting to an acquittal.

The prosecution applied for a fresh Summons (TN 1752/75) but again dates of application and issue are not known. However, the return date of the Summons was March 3, 1975. This time the charge was for dangerous driving at the same time and place as the first charge.

When defendant appeared in court on March 3, 1975, his counsel said that in addition to the earlier two appearances in court, the defendant had appeared a third time on January 20, 1975 in compliance with a Police Notice but as the prosecution did not have the Charge Sheet in court he had been asked to go away. He now faces a more serious charge to which counsel objected on the grounds that the earlier charge still remains. This objection was over-ruled and hearing was fixed for September 18, 1975.

The court could not proceed with the hearing on September 18, 1975 as the magistrate was on leave and then hearing was adjourned to December 23, 1975.

When defendant appeared on December 23, 1975, the prosecution asked for an adjournment on the grounds that investigation had not been completed. Counsel for defendant objected to the application on the grounds that there had been several postponements in the past and the charge should not be left hanging on the defendant's head for so long and drew the court's attention to the case of *Public Prosecutor* v. *Suppiah Pather*[1] whereupon the magistrate acquitted and discharged the defendant.

The question is whether the magistrate was right in making the order of acquittal at that stage.

On the authority of *Kuppusamy* v. *Public Prosecutor*,[2] a magistrate cannot acquit an accused person until the evidence for the prosecution has been heard. In a Summary Trial by a magistrate, his powers of acquittal can only be exercised either under section 173(f) of the Criminal Procedure Code at the close of the case for the prosecution when there is no case to answer or under section 173(m)(1) of the Criminal Procedure Code at the close of the case for the defence when the court finds the accused not guilty. Apart from these two provisions, a magistrate may order a discharge amounting to an acquittal when the Public Prosecutor declines to prosecute further at any stage before delivery of judgment under section 254 of the Criminal Procedure Code.

A magistrate, however, may discharge an accused person under either section 173(g) of the Criminal Procedure Code before the close of the case for the prosecution or section 173(n) of the Criminal Procedure Code before calling upon the accused to enter upon his defence but the discharge under these provisions does not amount to an acquittal.

The decision in *Suppiah Father's Case* is not fully reported but a portion of it appears in the report of *Ariffin bin Cassim Jayne* v. *Public Prosecutor*.[3] From what is reported, this was a Penang case and therefore the Criminal Procedure Code of the S.S. Cap 21 applied then. Section 182(g) of that Code is almost similar to our section 173(g) but with this important difference — the magistrates in Penang and Melaka had the power to acquit an accused person before the close of the case for the prosecution. Since January 10, 1976, however, the F.M.S. Code has been extended to Penang and Melaka and the magistrates there no longer have this power. The decision in Suppiah Pather was referred to in *Tan Ah Chan* v. *R.*[4] and it is clear from this report that the learned judge was dealing with a case under section 187 of the Criminal Procedure Code (S.S. Cap. 21) which is *in pari materia* to our section 254 of the Criminal Procedure Code. It is obvious therefore that *Suppiah Pather's Case* cannot apply to the facts of this case.

From the record no evidence for the prosecution has been heard in this case and neither has the prosecution declined to prosecute. They were in fact asking for an adjournment. The only power the magistrate had was to order a discharge under section 173(g) of the Criminal Procedure Code — such discharge not amounting to an acquittal. In any event, a magistrate may only exercise his powers under section 173(g) of the Criminal Procedure Code if he considers the charge to be groundless. The magistrate therefore had no power to order an acquittal.

The conduct of the prosecution in this case is deplorable. This is a motor accident case which occurred in the City of Kuala Lumpur and I cannot believe that the Traffic Police with all the resources at its disposal could not complete the investigation after more than two years following the accident. The Police prosecutors were even more casual in their work omitting to call witnesses at the various trial dates. The defendant has suffered great mental strain having had to appear in court several times without a positive result. It was understandable therefore that the magistrate should want to put an end to the dilatory tactics of the prosecution and the agony of the defendant. However, a third party has all this time suffered

in silence. According to the records, a person was injured as a result of this accident and no thought has been spared for him. He too has a right to see that justice is done.

According to Article 145 of the Federal Constitution only the Attorney-General has the power to institute, conduct or discontinue any proceedings for an offence. Until he makes up his mind the courts have to wait. Magistrates therefore have no business to usurp the functions of the Attorney-General. If the Police are slow complaints should be made to the Attorney-General who in the final analysis is answerable to Parliament.

I would advise magistrates to cease forthwith the practice of discharging not amounting to an acquittal a case when the Police are not ready to proceed. This is only sweeping the dirt under the carpet to produce neat monthly returns. The Police will only institute fresh proceedings as happened in this case and unnecessary paper work and inconvenience is caused. If the police are not ready, the magistrate should adjourn to another date. Even if it takes ten years to dispose a case that is better than pretending to dispose of it early by means not provided by law. So let it be. One of the virtues of the judiciary is patience. If the waiting should become unbearable the remedy lies elsewhere.

I would accordingly set aside the magistrate's order of discharge and acquittal and order that the case be remitted back to the magistrate for disposal according to the provisions of the Criminal Procedure Code.

Order accordingly.

Solicitors: *K.L. Rekhraj & Co.*

PUBLIC PROSECUTOR v. DATUK HAJI HARUN BIN HAJI IDRIS

[O.Cr.J. (Raja Azlan Shah F.J.) May 18, 1976]
[Kuala Lumpur — Federal Territory Criminal Trial No. 2 of 1976]

Criminal Law and Procedure — Statement by accused to police — Whether admissible — Whether amendment to Criminal Procedure Code retrospective in effect — Prevention of Corruption Act, 1961, s. 15 — Criminal Procedure Code (F.M.S. Cap. 6), s. 113.

Legislation — Amending statute — Legislation dealing with procedure or evidence — Whether of retrospective effect.

Evidence — Voluntary statement — Admissibility.

The accused had made a statement to the police on November 22, 1975. This was before the amendment of section 113 of the Criminal Procedure Code which came into force on January 10, 1976. It was argued that the statement was not admissible as the provisions of the former section 113 of the Criminal Procedure Code applied.

Held: (1) the amendment to the Criminal Procedure Code which is purely procedural is to be construed as retrospective in its operation in the absence of any contrary intention expressed in the Code and therefore section 113 of the Criminal Procedure Code as amended applied in this case;

(2) the statement was in any event rendered admissible under section 15 of the Prevention of Corruption Ordinance, 1961, for the purpose of a trial into an offence under that Act, subject to the condition that it is voluntarily made;

(3) on the facts of this case the statement was voluntarily made and was admissible in evidence.

CRIMINAL TRIAL.

Tan Sri Datuk Haji Mohamed Salleh bin Abas, Solicitor-General (*Abu Talib bin Othman* with him) for the Public Prosecutor.

R.R. Chelliah (*P. Vijendran* and *Haji Suhaimi bin Datuk Kamaruddin* with him) for the accused.

Raja Azlan Shah F.J.: Datuk Harun made a statement to the police on November 22, 1975. That was before the amendment of section 113 of the Criminal Procedure Code which came into force on January 10, 1976. He was arrested two days later. His counsel objected to the admissibility of that statement contending that the old provisions of section 113 still applied and it therefore follows that by virtue of that section the statement was not admissible as evidence.

The general rule is that statutes, particularly amending statutes, are *prima facie* prospective, and retrospective effect is not to be given to them unless by clear words or necessary implication. This presumption does not always apply in cases of legislation dealing with procedure or evidence. Before the amendment a statement recorded under section 112 of the Criminal Procedure Code cannot, by virtue of section 113 of the Criminal Procedure Code be used as evidence against the accused. After the amendment such a statement shall be admissible in evidence at his trial. This only means that the rule governing the manner in which such statement can be used as evidence at his trial has been amended. The change is one in procedure; the amendment to section 113 of the Criminal Procedure Code affected the manner in which such evidence is to be enforced. An amending statute which is purely procedurial is to be construed as retrospective in its operation, unless a contrary intention appears. In my opinion, there does not seem to be a contrary intention expressed in section 1 of the Criminal Procedure Code (Amendment and Extension) Act, 1976 that it is to operate prospectively. No person has any vested interest in the course of a procedure if during an investigation that procedure is changed. It follows that section 113 of the Criminal Procedure Code as amended applied in this case.

Assuming the old provisions of section 113 of the Criminal Procedure Code applied, I still think that the statement recorded under the provisions of the Criminal Procedure Code is not rendered inadmissible under section 15 of the Prevention of Corruption Act, 1961 for the purpose of a trial into an offence under that Act, subject of course, to the stringent condition that it was voluntarily made. The old provisions of section 113 of the Criminal Procedure Code are plainly at variance with the provisions of section 15 of the Prevention of Corruption Act, and, in my opinion, cannot be allowed to prevail over the latter for this reason. It would render section 15 of the Prevention of Corruption Act inoperative if the accused's statement is not admissible as evidence at his trial, and, since the Act was enacted later than the Criminal Procedure Code, the provisions of the later Act must prevail if there is any irreconcilable contradiction between their respective provisions. In my judgment, the words "... any statement by an accused person ... made at any time ... whether in the course of a police investigation or not